

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 02-274-91
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND
GUNN CHIT TUAN SCJJ
17 AUGUST 1991

Civil Procedure — Winding up — Appeal against winding-up order — Motion for stay of order — Whether application can be made by company — Application made by solicitors — Companies Act 1965, ss 243(1) & 253(2) — Courts of Judicature Act 1964, s 44(1)

Companies and Corporations — Winding up — Whether company can appeal against winding-up order and apply for stay — Courts of Judicature Act 1964, s 44(1) — Companies Act 1965, s 253(2)

In this case a winding-up order had been made against the appellant company. An appeal against the winding-up order was filed and an application was made by motion for an order of stay of the winding-up order pending disposal of the appeal. The motion was supported by an affidavit by the solicitors of the company which merely stated that as solicitors of the company, they were making the application for stay pending disposal of the appeal.

Held, dismissing the motion:

(1) Section 253(2) of the Companies Act 1965 provides that, subject to the rules, an appeal from an order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the High Court in cases within its ordinary jurisdiction. An appeal can therefore be made to the Supreme Court against an order for the winding up of a company.

(2) As there is a right of appeal, it is implicit that there is also a right to make any incidental application in respect of a pending appeal to the Supreme Court, as provided in s 44(1) of the Courts of Judicature Act 1964.

(3) After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. The only question is who should move the appeal on behalf of the company.

(4) In this case the affidavit in support of the motion for stay was by the solicitors of the company which merely stated that as solicitors of the company, they are making the application for stay pending disposal of the appeal. As the motion was not properly before the court, it is dismissed.

[Bahasa Malaysia summary]

Di dalam kes ini perintah penggulangan telah dibuat terhadap syarikat perayu. Rayuan terhadap perintah penggulangan itu telah difail dan permohonan telah dibuat melalui usul untuk menggantung perintah penggulangan itu sementara menanti keputusan rayuan. Usul itu telah disokong dengan affidavit oleh peguamcara syarikat itu yang hanya menyatakan bahawa mereka sebagai peguamcara syarikat membuat permohonan untuk penggantungan sementara menanti keputusan rayuan.

A **Diputuskan**, menolak usul itu:

(1) Section 253(2) Akta Syarikat 1965 memperuntukkan bahawa, tertakluk kepada kaedah-kaedah, rayuan boleh dibuat dari perintah atau keputusan yang dibuat atau diberi di dalam penggulangan syarikat dengan cara yang sama dan tertakluk kepada syarat-syarat yang sama seperti rayuan dari perintah atau keputusan Mahkamah Tinggi dalam kes-kes di dalam bidang kuasa biasanya. Oleh kerana itu, rayuan boleh dibuat oleh syarikat itu kepada Mahkamah Agung terhadap perintah penggulangan syarikat itu.

(2) Oleh kerana terdapat hak rayuan, adalah tersirat bahawa terdapat juga hak membuat permohonan bersampingan mengenai suatu rayuan yang sedang menunggu keputusan Mahkamah Agung, seperti yang diperuntukkan oleh s 44(1) Akta Mahkamah Kehakiman 1964.

(3) Selepas perintah penggulangan dibuat, pada amnya tiada seorang pun kecuali likuidator boleh bertindak bagi pihak syarikat. Akan tetapi jelas bahawa syarikat itu mempunyai hak menunjukkan bahawa perintah penggulangan itu telah dibuat secara salah dan merayu terhadap perintah itu. Soalnya siapakah yang boleh membawa rayuan itu bagi pihak syarikat.

(4) Di dalam kes ini affidavit untuk menyokong usul penggantungan dibuat oleh peguamcara syarikat itu dan hanya menyatakan bahawa mereka sebagai peguamcara syarikat itu membuat permohonan penggantungan sementara menanti keputusan rayuan. Oleh kerana usul itu tidak dibawa dengan sewajarnya ke hadapan mahkamah, ia hendaklah ditolak.]

Cases referred to

- 1 *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 (refd)
- 2 *Brinds Ltd & Ors v Offshore Oil NL & Ors* (1985) 10 ACLR 242 (refd)
- 3 *Re Diamond Fuel Company* (1879) 13 Ch D 400 (refd)
- 4 *Rajannan s/o Ravaniah & Ors v Sivalingam s/o Arumugam Karupiah* (Civil Appeal No 02-41-1990) (unreported) (distd)

Legislation referred to

Companies Act 1965 ss 243(1), 253(2)
Courts of Judicature Act 1964 s 44(1)

Appeal from: Companies (Winding-up) No D4-28-28-29 (High Court, Kuala Lumpur)

G *G Sri Ram (MS Murthi with him)* for the applicant/appellant.

Loh Siew Cheang (Ranjit Singh with him) for the respondent.

Norin Badaruddin (Federal Counsel) for the Official Receiver.

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Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): On 18 July 1991, a winding-up order was made by the High Court, Kuala Lumpur (Zakaria Yatim J) against Sri Hartamas Development Sdn Bhd (the applicant in the motion before us) after ruling that the company had been unable to pay its debts consisting of claims by judgment creditors totalling \$37.1m and claims by supporting creditors amount-

ing to \$1.4m. On the same day, an application for stay was refused by the same learned judge who also appointed the official receiver as provisional liquidator.

An appeal against the winding-up order was filed on 20 July 1991. The motion before this court was for an order of stay of the winding-up order pending disposal of the appeal.

In the affidavit in support of the motion, the grounds given for the application for stay was that in actual fact the company had very much more assets than debts, could settle all the debts and was therefore not insolvent. It is said that the company had its assets valued by an international valuer, Jones Lang Wootton, at \$597,590,000.

At the commencement of the hearing of the motion, Mr SC Loh, counsel for the respondent, MBF Finance Bhd, raised a preliminary objection that the applicant was not one of the persons described in s 243(1) of the Companies Act 1965 ('the Act') to make the application for stay. It was contended by Mr Loh, quite correctly in our view, that under s 243(1) of the Act after an order for winding up has been made by the court, the application for stay of all proceedings relating to the winding up may be made only by the liquidator or any creditor or contributory. Thus any other person is not qualified to apply for stay under that section. Upon such application under s 243(1) of the Act the court may order stay of the proceedings on such terms and conditions as the court may think fit.

It is also not disputed that the word 'court' appearing in s 243 means 'the High Court' as defined in s 4 of the Act.

However, in our view, Mr Loh was not, with respect, correct if he said that the company could not appeal at all against the winding-up order. It is provided quite clearly in s 253(2) of the Act that, subject to the rules, an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction. Therefore under that provision, an appeal can be made to this court against an order for the winding up of a company.

Where there is a right of appeal it is implicit that there is also a right to make any incidental application in respect of a pending appeal to this court. The authority for this is to be found in s 44(1) of the Court of Judicature Act 1964 itself which reads as follows:

In any proceeding pending before the Supreme Court any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Supreme Court.

- A In respect of the present motion before us, it is to be observed that there is only one affidavit in support of the motion and the affidavit is by the solicitors of the company, which affidavit merely states that as solicitors of the company, they are making the application for stay pending disposal of the appeal. The rest of the affidavit deals with the grounds relied on for the application for stay.
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In *Re Union Accident Insurance Co Ltd*,¹ it was held, inter alia, that notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers, the board still retained certain residuary powers which included authority to instruct solicitors and counsel to oppose the petition and, if a winding-up order is made, to appeal against the order. In that case it was also held that the power to instruct solicitors and counsel is not the power which any one could suggest has passed to the provisional liquidator. At p 1113, Plowman J said:

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- D The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company.
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Plowman J's decision found support in the Supreme Court of Victoria, Australia (where our Companies Act 1965 came from) in *Brinds Ltd & Ors v Offshore Oil NL & Ors*² where in the judgment of that court the following passage appears:

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- H During the argument, I raised the question whether the applicant, Brinds Ltd, having been in liquidation since December 1983 and throughout apparently insolvent, had any locus standi to make, itself, this application for a stay, as distinct from on the one hand, such an application made by or with the consent of the liquidator and, on the other hand, a different application by others under s 383 of the Code.

Since then, the researches of Nicholson J have discovered that ingenious counsel in 1879 raised the question and put the negative answer to the Court of Appeal in England in *Re Diamond Fuel Co* (1879) 13 Ch D 400 — see especially pp 404-405. Nearly 100 years later, in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at pp 1112-1113, Plowman J suggested what I think are substantial reasons for an affirmative answer and, in any event, I think this court should proceed on the footing that the directors of Brinds Ltd have power to bring the present application in

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the name of the company. See also *McPherson Company Law* (2nd Ed) p 394 et seq.

*Re Diamond Fuel Company*³ is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.

After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s 253(2) of the Act. The only question is who should move the appeal on behalf of the company.

An earlier decision of this court in *Rajannan s/o Ravaniah & Ors v Sivalingam s/o Arumugam Karuppiyah*⁴ is to be distinguished. There the notice of motion for stay and the supporting affidavits were filed by the directors and shareholders of Tamil Osai Sdn Bhd, the company, and they together with the company filed a motion for stay of the winding-up order pending appeal. The application for stay was allowed by this court although the appeal itself was subsequently dismissed.

As the present motion before us was not properly before the court, we upheld the preliminary objection and dismissed the motion with costs.

Motion dismissed.

Solicitors: *Murthi & Partners; Cheang & Ariff.*

Reported by *Prof Ahmad Ibrahim*

A **Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus**

HIGH COURT (PENANG) — CRIMINAL APPLICATION
NO 44-62-89
EDGAR JOSEPH JR J
22 JULY 1991

B *Family Law — Custody — Application for habeas corpus — Parties are Muslims — Whether High Court has jurisdiction to deal with the matter — Administration of Muslim Law Enactment 1959 (Penang), s 40(3) — Courts of Judicature Act 1964, ss 23 & 24 — Guardianship of Infants Act 1961, ss 5 & 11 — Civil Law Act 1956, s 27 — Federal Constitution, arts 4 & 121*

C *Civil Procedure — Jurisdiction of High Court — Custody of child — Parties are Muslims — Whether High Court has jurisdiction to hear application — Whether court of kadi or kadi besar constituted under s 39 of the Administration of Muslim Law Enactment 1959 (Penang) has exclusive jurisdiction*

D *Islamic Law — Administration of — Jurisdiction of courts of kadi and kadi besar — Custody of Muslim child — Jurisdiction of court of kadi or kadi besar to hear application*

In this case the applicant, the father of a child whose mother had died, applied for a writ of habeas corpus in respect of the child. The child was in the care of the respondent, the maternal grandmother of the child. The learned trial judge treated the application as an application for custody of the child and considered the question whether the court has jurisdiction to deal with the matter.

Held, deciding that the High Court has jurisdiction to deal with the application:

(1) There is nothing in s 40(3) of the Administration of Muslim Law Enactment 1959 of Penang which confers exclusive jurisdiction on the court of kadi besar in matters relating to the custody of children where the parties are Muslims and therefore the High Court also has jurisdiction to deal with the matter.

G (2) Article 121(1)(a) of the Federal Constitution does not affect the jurisdiction of the High Court because the effect of s 4 of the Courts of Judicature Act 1964 is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Court made after the date of its commencement unless made with retrospective effect.

[Bahasa Malaysia summary]

H Di dalam kes ini, pemohon, bapa seorang anak yang emaknya telah meninggal, telah memohon satu writ habeas corpus berkenaan anak itu. Anak itu berada dalam jagaan penentang, nenek sebelah ibu anak itu. Hakim yang arif mensifatkan permohonan itu sebagai satu permohonan untuk penjagaan anak itu dan mempertimbangkan soalan sama ada mahkamah mempunyai bidang kuasa menyelesaikan perkara itu.

Diputuskan, membuat keputusan bahawa Mahkamah Tinggi mempunyai bidang kuasa menyelesaikan permohonan itu:

I (1) Tidak terdapat apa-apa di dalam s 40(3) Enakmen Pentadbiran Undang-Undang Islam 1959 Pulau Pinang yang memberikan bidang kuasa eksklusif kepada mahkamah kadi besar dalam perkara berkenaan dengan penjagaan kanak-kanak di mana pihak-pihak beragama Islam dan oleh kerana itu, Mahkamah Tinggi juga mempunyai bidang kuasa menyelesaikan perkara itu.